

## **SETTLEMENT AGREEMENT**

### **PARTIES**

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (“OIG-HHS”) of the Department of Health and Human Services (“HHS”) (collectively, the “United States”); Mercy Health System of Southeastern Pennsylvania (“MHS”); Mercy Catholic Medical Center, Mercy Fitzgerald Hospital Division; Mercy Catholic Medical Center, Mercy Philadelphia Hospital Division; and Mercy Suburban Hospital (collectively, the “Hospital Entities;” together with MHS, the “MHS Parties”), through their authorized representatives.

### **PREAMBLE**

As a preamble to this Agreement, the Parties agree to the following:

- A. The Hospital Entities are private, not-for-profit, acute-care hospitals located in and around Philadelphia, PA, that provide clinical inpatient and outpatient services to patients in the Philadelphia metropolitan area. MHS is the parent corporation of each of the hospitals.
- B. This settlement follows a voluntary disclosure by MHS. MHS has voluntarily disclosed that it submitted or caused to be submitted non-covered claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh.
- C. The United States contends that it has certain civil causes of action, as specified

in Paragraph 4, below, against the MHS Parties for engaging in the following conduct:

Submission of non-covered claims for “One-day” inpatient admissions (i.e. claims bearing an admission date followed by a discharge date one day later) for dates of service from October 1, 2001 through September 30, 2007.

The conduct described in this Paragraph is hereinafter referred to as the “Covered Conduct.”

D. The United States also contends that it has certain administrative claims, as specified in Paragraphs 3 and 4 below, against the MHS Parties for engaging in the Covered Conduct.

E. The MHS Parties deny any liability for the claims specified in the Covered Conduct or under Paragraph C of this Preamble.

F. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

#### **TERMS AND CONDITIONS**

1. The MHS Parties agree to pay to the United States \$7,920,708.18, plus interest accrued from the Effective Date of this agreement at the published post-judgment interest rate. Interest shall begin to accrue as of the Effective Date of the Agreement. The foregoing payment shall be made as follows:

a. Within thirty (30) business days from the Effective Date of this Agreement, the MHS Parties agree to pay \$2,640,236.06 to the United States by electronic

funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office for the Eastern District of Pennsylvania.

b. Within one year of the Effective Date of this Agreement, the MHS Parties agree to pay \$2,640,236.06, plus interest at 0.36%, to the United States by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office for the Eastern District of Pennsylvania. Interest shall begin to accrue as of the Effective Date of the Agreement.

c. Within two years of the Effective Date of this Agreement, the MHS Parties agree to pay \$2,640,236.06, plus interest at 0.36%, to the United States by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office for the Eastern District of Pennsylvania. Interest shall begin to accrue as of the Effective Date of the Agreement.

2. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of the MHS Parties in this Agreement and conditioned upon the MHS Parties' full payment of the Settlement Amount, and subject to Paragraph 12, below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release the MHS Parties from any civil or administrative monetary claim the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law

theories of payment by mistake, unjust enrichment, and fraud. No individuals are released by this agreement.

3.

a. In consideration of the obligations of the MHS Parties in this Agreement and conditioned upon the MHS Parties' full payment of the Settlement Amount, and subject to Paragraph 12, below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against the Hospital Entities, under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 4 below, and as reserved in this Paragraph. OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude the Hospital Entities from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 4, below.

b. Notwithstanding the foregoing, in the event of Default as defined in Paragraph 13, below, OIG-HHS may exclude the MHS Parties from participating in all Federal health care programs until the MHS Parties pay the Settlement Amount and reasonable costs as

set forth in Paragraph 1, above. OIG-HHS will provide written notice of any such exclusion to the MHS Parties. The MHS Parties waive any further notice of the exclusion under 42 U.S.C. § 1320a-7(b)(7), and agree not to contest such exclusion either administratively or in any state or federal court. Reinstatement to program participation is not automatic. If at the end of the period of exclusion the MHS Parties wish to apply for reinstatement, the MHS Parties must submit a written request for reinstatement to OIG-HHS in accordance with the provisions of 42 C.F.R. §§ 1001.3001-.3005. The MHS Parties will not be reinstated unless and until OIG-HHS approves such request for reinstatement.

4. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including the MHS Parties) are the following claims of the United States:

- a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability to the United States (or its agencies) for any claims submitted to Medicaid described in Paragraph C above including, but not limited to, claims made to

Medicaid for Medicare co-payments or deductibles for beneficiaries who are dual-eligibles, i.e., enrolled in both Medicare and Medicaid;

f. Any liability based upon such obligations as are created by this Agreement;

g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services; and

h. Except as explicitly stated in this Agreement, any liability of individuals, including officers and employees.

5. The MHS Parties waive and shall not assert any defenses they may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

6. The MHS Parties fully and finally release the United States, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) which the MHS Parties have asserted, could have asserted, or may assert in the future against the United States, its agencies, employees,

servants, and agents, related to the Covered Conduct and the United States' investigation and prosecution thereof.

7. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary, or any state payor, related to the Covered Conduct; and the MHS Parties shall not resubmit to any Medicare carrier or intermediary or any state payor any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

8. The MHS Parties agree to the following:

a. Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47, and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of the Hospital Entities, their present or former officers, directors, employees, shareholders, and agents in connection with the following shall be "unallowable costs" on government contracts and under the Medicare, Medicaid, TRICARE, and FEHBP Programs:

- (1) the matters covered by this Agreement,
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement,
- (3) investigative, defense, and corrective actions undertaken by the Hospital Entities in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees),

(4) the negotiation and performance of this Agreement, and

(5) the payment the MHS Parties make to the United States pursuant

to this Agreement, including any costs and attorneys fees.

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for in nonreimbursable cost centers by the MHS Parties, and the MHS Parties shall not charge such unallowable costs directly or indirectly to any contracts with the United States or any state Medicaid program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by the MHS Parties or any of their subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: The Hospital Entities further agree that within 90 days of the Effective Date of this Agreement they shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA, and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by the MHS Parties or any of their subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. The MHS Parties agree that the United States, at a minimum, shall be entitled to recoup from them any overpayment plus



applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice, and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by MHS Parties or any of its subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph) on MHS Parties or any of their subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine the facility's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

9. This Agreement is intended to be for the benefit of the Parties only and the Parties do not release any claims against any other person or entity, except as explicitly stated in this Agreement.

10. The MHS Parties waive and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

11. The MHS Parties warrant that they has reviewed their financial situation and that they currently are solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to the MHS Parties, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended and do, in fact, represent a reasonably equivalent exchange of value which is not intended to hinder, delay, or defraud any entity to which the MHS Parties were or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

12. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, the MHS Parties commence, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of the MHS Parties' debts, or seeking to adjudicate the MHS Parties as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for the MHS Parties or for all or any substantial part of the MHS Parties' assets, the MHS Parties agree as follows:

a. The MHS Parties' obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and the MHS Parties shall not argue or otherwise take the

position in any such case, proceeding, or action that: (i) the MHS Parties' obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) the MHS Parties were insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the United States; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to the MHS Parties.

b. If the MHS Parties' obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against the MHS Parties for the claims that would otherwise be covered by the releases provided in Paragraphs 2 - 4, above. The MHS Parties agree that (i) any such claims, actions, or proceedings brought by the United States (including any proceedings to exclude the MHS Parties from participation in Medicare, Medicaid, or other Federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and the MHS Parties shall not argue or otherwise contend that the United States' claims, actions, or proceedings are subject to an automatic stay; (ii) the MHS Parties shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by the United States within 60 calendar days of written notification to the MHS Parties that the releases have been

rescinded pursuant to this Paragraph, except to the extent such defenses were available on the Effective Date of the Agreement; and (iii) the United States has a valid claim against the MHS Parties in the amount of \$12,742,554 or for penalties at its election, and the United States may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. The MHS Parties acknowledge that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

13. In the event that the MHS Parties fail to pay any amount as provided in Paragraph 1 within five (5) business days of the date upon which such payment is due, the MHS Parties shall be in Default of their payment obligations ("Default"). The United States will provide written notice of the Default, and the MHS Parties shall have an opportunity to cure such Default within five (5) business days from the date of receipt of the notice. Notice of Default will be delivered to John Joseph, Post & Schell, Four Penn Center, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103, or to such other representative as the MHS Parties shall designate in advance in writing. If the MHS Parties fail to cure the Default within five (5) business days of receiving the Notice of Default, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of Default on the remaining unpaid total (principal and interest balance). The MHS Parties shall consent to a Consent Judgment in the amount of the unpaid balance, and the United States, at its sole option, may: (a) offset the remaining unpaid balance from any amounts due and owing to the MHS Parties by any

department, agency, or agent of the United States at the time of the Default; or (b) exercise any other rights granted by law or in equity, including the option of referring such matters for private collection. The MHS Parties agree not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this Paragraph, either administratively or in any state or federal court. The MHS Parties shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

14. In the event of Default as defined in Paragraph 13, above, OIG-HHS may exclude the MHS Parties from participating in all Federal health care programs until the MHS Parties pay the Settlement Amount and reasonable costs as set forth in Paragraph 1, above. Such exclusion shall have national effect and shall also apply to all other federal procurement and non-procurement programs. Federal health care programs shall not pay anyone for items or services, including administrative and management services, furnished, ordered, or prescribed by the MHS Parties in any capacity while the MHS Parties are excluded. This payment prohibition applies to the MHS Parties and all other individuals and entities (including, for example, anyone who employs or contracts with the MHS Parties, and any hospital or other provider where the MHS Parties provides services). The exclusion applies regardless of who submits the claim or other request for payment. The MHS Parties shall not submit or cause to be submitted to any Federal health care program any claim or request for payment for items or services, including administrative and management services, furnished, ordered, or prescribed by the MHS Parties during the exclusion. Violation of the conditions of the exclusion may result

in criminal prosecution, the imposition of civil monetary penalties and assessments, and an additional period of exclusion. The MHS Parties further agree to hold the Federal health care programs, and all federal beneficiaries and/or sponsors, harmless from any financial responsibility for items or services furnished, ordered, or prescribed to such beneficiaries or sponsors after the effective date of the exclusion. The MHS Parties waive any further notice of the exclusion under 42 U.S.C. § 1320a-7(b)(7), and agree not to contest such exclusion either administratively or in any state or federal court. Reinstatement to program participation is not automatic. If at the end of the period of exclusion the MHS Parties wish to apply for reinstatement, the MHS Parties must submit a written request for reinstatement to the OIG in accordance with the provisions of 42 C.F.R. §§ 1001.3001-.3005. The MHS Parties will not be reinstated unless and until the OIG approves such request for reinstatement.

15. Except as expressly provided to the contrary in this Agreement, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

16. The MHS Parties represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

17. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Eastern District of Pennsylvania.

18. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

19. The individuals signing this Agreement on behalf of the MHS Parties represent and warrant that they are authorized by the MHS Parties to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

20. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement. Such counterparts may be electronic copies of physical documents, including but not limited to facsimiles, .pdf images, .tiff images, and other, similar electronic formats.

21. This Agreement is binding on the MHS Parties' successors, transferees, heirs, and assigns.

22. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

23. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). In accordance with Paragraph 20 above, facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

(Continued on next page)

THE UNITED STATES OF AMERICA

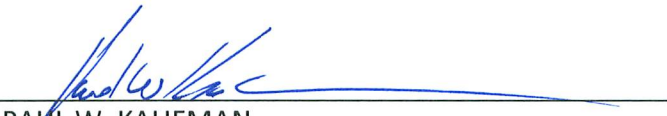
DATED: 7/16/10 BY: \_\_\_\_\_

  
ZANE DAVID MEMEGER  
United States Attorney

DATED: 7/16/10 BY: \_\_\_\_\_

  
MARGARET L. HUTCHINSON  
Assistant United States Attorney  
Chief, Civil Division

DATED: 7/16/10 BY: \_\_\_\_\_

  
PAUL W. KAUFMAN  
Assistant United States Attorney



**THE UNITED STATES OF AMERICA (Cont.)**

TONY WEST  
Assistant Attorney General

DATED:

7/19/10

BY:

  
ANDY J. MAO

Senior Counsel for Health Care Fraud and  
Elder Justice

Commercial Litigation Branch, Civil Division  
United States Department of Justice

THE UNITED STATES OF AMERICA (Cont.)

DATED:

7/21/10

BY:



GREGORY E. DEMSKE

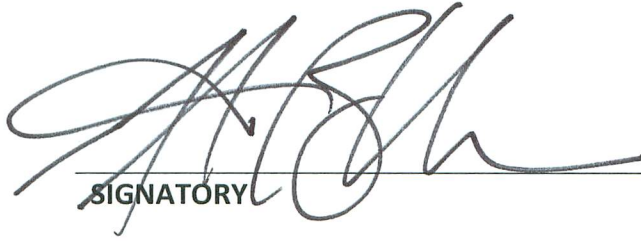
Assistant Inspector General for Legal Affairs  
Office of Counsel to the Inspector General  
Office of Inspector General  
United States Department of Health and  
Human Services

**MERCY HEALTH SYSTEM OF SOUTHEASTERN PENNSYLVANIA,  
MERCY CATHOLIC MEDICAL CENTER, AND MERCY SUBURBAN HOSPITAL**

DATED:

6/15/10

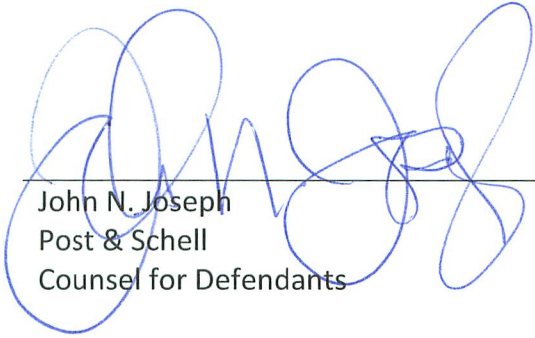
BY:

  
SIGNATORY

DATED:

8/30/10

BY:

  
John N. Joseph  
Post & Schell  
Counsel for Defendants